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Product Liability - Real Property Improvements - Statute of Repose

Paul R. Naim

PRODUCT LIABILITY—REAL PROPERTY IMPROVEMENTS—STATUTE OF REPOSE—The Supreme Court of Pennsylvania held that manufacturers of defective products that are incorporated by others into improvements to real property are not protected from liability pursuant to the Pennsylvania Statute of Repose.

McConnaughey v. Building Components, Inc., 637 A.2d 1331 (Pa. 1994).

R. Floyd McConnaughey and Dorothy McConnaughey (the "Appellants") purchased preconstructed roof trusses in 1970 from Building Components, Inc. (the "Appellee"), a manufacturer of roof trusses.[1] The Appellee manufactured the roof trusses using metal gusset plates[2] supplied by Inter-Lock Steel Company.[3] The trusses were subsequently used in the construction of the Appellants' free-stall barn.[4] On January 30, 1986, sixteen years after the installation of the Appellee's trusses in the Appellants' barn, the roof of the barn collapsed causing significant property damage.[5]

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1. McConnaughey v. Building Components, Inc., 637 A.2d 1331, 1333 (Pa. 1994). A roof truss used in the construction of a building structure consists of a combination of timbers, iron or timbers and iron work, so arranged as to constitute an unyielding frame. THE NEW WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE, 899 (7th ed. 1971). The trusses in question were fabricated by the Appellee using wooden timbers. *McConnaughey*, 637 A.2d at 1332.

2. *McConnaughey*, 637 A.2d at 1333. The gusset plates in question were metal plates used to splice the individual wooden beams together to form the trusses. *Id.* The plates were designed to provide support at the various stress points in the trusses. *Id.*

3. *Id.* The trusses were of a standard design and configuration and were not manufactured to any particular specifications provided by the Appellants. *Id.* The Appellee maintained a supply of these mass-produced trusses for sale to the public. *Id.* Inter-Lock Steel was named as a second defendant in the Appellants' original action brought in the Court of Common Pleas of Westmoreland County. *Id.*

4. *Id.* The barn was erected on the Appellants' property located in Westmoreland County. *Id.* at 1332. At the trial court, the extent to which the Appellee was involved in the planning, design or construction of the barn was not clearly established by the parties. *Id.* at 1335. The superior court found that the Appellees were not involved in the planning, design or construction of the barn. McConnaughey v. Building Components, Inc., 585 A.2d 485, 486 (Pa. Super. Ct. 1990), *rev'd*, 637 A.2d 1331 (Pa. 1994). However, the Supreme Court of Pennsylvania held that a genuine issue of material fact existed and, upon remand, directed the trial court to resolve the issue. *McConnaughey*, 637 A.2d at 1335.

5. *McConnaughey*, 637 A.2d at 1333. Specifically, the Appellants alleged that

The Appellants instituted a negligence action against the Appellee alleging that the collapse of the Appellants' barn was proximately caused by the negligent manufacture and defective construction of the Appellee's preconstructed roof trusses.[6] The Appellants further alleged that corrosion of the metal gusset plates contributed to the structural failure of the trusses.[7] The Court of Common Pleas of Westmoreland County granted the Appellee's motion for summary judgment[8] based upon the specific determination that the Appellants' action against the Appellees was barred by the Statute of Repose (the "Statute")[9] applicable to construction projects.[10] The determining factor in the court's decision was that the roof trusses were improvements to real property.[11] The court concluded that the Appellee was enti-

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the incident destroyed the barn and killed 37 dairy cows. *Id.*

6. *Id.*

7. *Id.* Specifically, the coating on the truss splice plates showed signs of inter-granular cracking resulting from corrosion. *Id.*

8. *Id.* Summary judgment is granted when the pleadings, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of any material fact and the moving party is entitled to a judgment as a matter of law. PA. R. CIV. P. 1035(b). In determining whether a motion for summary judgment was properly granted, Pennsylvania appellate courts review the record in a manner most favorable to the non-moving party, and all doubt as to the existence of a genuine issue of material fact will be resolved against the moving party. *McConnaughey*, 637 A.2d at 1333 (quoting Marks v. Tasman, 589 A.2d 205, 206 (Pa. 1991)).

9. *McConnaughey*, 637 A.2d at 1333. The Pennsylvania Statute of Repose, applicable to construction projects, provides:

> (a) General Rule,—Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:
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> (1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.
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> (2) Injury to property, real or personal, arising our of any such deficiency.
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> (3) Injury to the person or for wrongful death arising out of such deficiency.

42 PA. CONS. STAT. § 5536 (1981).

Interpreting the Statute, the Supreme Court of Pennsylvania established three requirements that must be demonstrated in order for a moving party to use the Statute as a defense:

> The party moving for protection under the statute of repose must show: (1) what was supplied was an improvement to real estate; (2) more than 12 years have elapsed between the completion of the improvements to the real estate and the injury; and (3) the activity of the moving party must be within the class which is protected by the Statute.

McCormick v. Columbus Conveyer Co., 564 A.2d 907, 909 (Pa. 1988).

10. *McConnaughey*, 637 A.2d at 1333. The court of common pleas denied Inter-Lock Steel Company's motion for summary judgment. *Id.*

11. *Id.* In *McCormick*, the supreme court defined improvement as a "valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and

tled to full protection under the Statute.[12]

The Appellants appealed to the Superior Court of Pennsylvania.[13] While conceding that the roof trusses were improvements to real property, the Appellants argued that the Statute did not protect manufacturers who merely supplied a component that was incorporated into an improvement to real estate.[14] Moreover, the Appellants asserted that the Statute was intended to protect only those persons who took an active part in the design, planning, supervision, observation or construction of improvements to real property.[15]

The superior court rejected the Appellants' contentions and asserted that the Statute was not limited to persons performing professional or licensed services.[16] The court noted that the Statute did not identify the protected classes by their status or occupation, but rather by the contribution or acts they performed in the course of improving the real property.[17] The statutory protection applied to manufacturers who designed, planned or constructed component parts that were subsequently incorporated into improvements to real property.[18] The court further reasoned that manufacturers and suppliers need not customize or assist in the installation of their products in order to be protected by the Statute.[19] The court broadly interpreted

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intended to enhance its value, beauty or utility or to adapt it for new or further purposes." *McCormick*, 564 A.2d at 909.

12. *McConnaughey*, 637 A.2d at 1334.

13. McConnaughey v. Building Components, Inc., 585 A.2d 485, 488 (Pa. Super. Ct. 1990), *rev'd*, 637 A.2d 1331 (Pa. 1994).

14. *McConnaughey*, 585 A.2d at 487-88. The roof trusses were improvements to real property according to the definition of fixtures. *Id.* A fixture is personal property that is attached to a building and is considered to be part of the real estate. *Id.* (quoting Catanzaro v. Wasco Products, Inc., 489 A.2d 262, 265 (Pa. Super. Ct. 1985)).

15. *McConnaughey*, 585 A.2d at 488. The superior court rejected the claim that the Statute was intended to extend protection only to this limited class of persons. *Id.* (citing Leach v. Philadelphia Sav. Fund Soc'y, 340 A.2d 491 (Pa. Super. Ct. 1975)).

16. *McConnaughey*, 585 A.2d at 488.

17. *Id.* The *McConnaughey* court, relying on a prior superior court decision, reasoned that the statutory protection included manufacturers who had designed, planned or constructed products incorporated as improvements into real property. *Id.* (citing *Catanzaro*, 489 A.2d at 266).

18. *McConnaughey*, 585 A.2d at 488. In reaching its decision, the court relied upon the reasoning in *Mitchell*, where the superior court concluded that although the basic design of an elevator may be identical in different buildings, this did not render the elevator system any less an improvement to real estate. *Id.* (citing Mitchell v. United Elevator Co., 434 A.2d 1243 (Pa. Super. Ct. 1981)).

19. *McConnaughey*, 585 A.2d at 488 (quoting *Leach*, 340 A.2d 491). In *Leach*, the superior court interpreted the Statute to immunize from liability any person lawfully performing or furnishing the activities described in the Statute. *Leach*, 340

the Statute to include any improvements to real property, and affirmed the order below.[20]

The Supreme Court of Pennsylvania[21] reversed the decision of the superior court and remanded the case to the trial court.[22] The court focused on whether the Pennsylvania legislature intended the Statute to protect manufacturers and suppliers.[23] The court determined that the language of the Statute identified the protected classes, not by their status or occupation, but rather by the contribution or activity performed.[24] Accordingly, the proper focus in determining whether actors were protected by the Statute was whether they performed acts involving the design, planning, supervision, construction or observation in the course of improving real property.[25] Hence, the court determined that the Pennsylvania General Assembly intended to protect only those actors whose contributions to improvements to real property were similar to those commonly associated with builders, designers and planners.[26]

The supreme court expressly rejected the analysis used by the

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A.2d at 493. The word "any" was interpreted to be used in the sense of "all" or "every" and to have a comprehensive scope. *Id.*

20. *McConnaughey*, 585 A.2d at 489. The dissent emphasized the distinction between materials which were incorporated into a finished product, and finished products which were designed to be included as a fixture or improvement to real estate. *Id.* (Kelley, J., dissenting). Judge Kelly asserted that this case was indistinguishable from *Ferricks v. Ryan Homes*. *Id.* at 490 (citing Ferricks v. Ryan Homes, Inc., 578 A.2d 441, 444 (Pa. Super. Ct. 1990)). In *Ferricks*, the superior court held that a manufacturer of plywood merely supplied a component part of an improvement and, thus, was not protected by the Statute. *Ferricks*, 578 A.2d at 444. As a component part, the plywood did not serve a particular purpose or have a sole function outside of its function within the completed product or improvement. *Id.* Moreover, the court noted that component parts were neither built nor modified to serve any specific purpose or meet any specification required for the improvement. *Id.* The dissent labeled the individuals who provide these distinct services as suppliers and builders. *McConnaughey*, 585 A.2d at 489 (Kelley, J., dissenting). The suppliers were not entitled to protection under the Statute, while the builders were within the class protected by the Statute. *Id.* The dissent further argued that this distinction was rationally based on real differences under which each produced its product. *Id.* at 490 (citing Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715, 719 (Pa. 1978) (holding that the Statute applied to builders, but not suppliers)).

21. The majority opinion was written by Justice Papadakos. *McConnaughey*, 637 A.2d at 1332. Chief Justice Nix, joined by Justices Zappala and Cappy concurred in the result. *Id.* at 1335.

22. *Id.*

23. *Id.* at 1334.

24. *Id.* at 1334 n.3.

25. *Id.* at 1334.

26. *McConnaughey*, 637 A.2d at 1333. The supreme court interpreted the use of the word "any" in Section 5536 to include only active participants in the construction process. *Id.* at 1334 n.3. Consistent with the holding in *Freezer Storage*, the supreme court interpreted the word generally in the sense of all or every, but held that its meaning was not comprehensive. *Id.*

trial and intermediate appellate courts.[27] The court noted that the lower courts incorrectly expanded the scope of protection afforded by the Statute to include manufacturers and suppliers who did not participate in improving real property.[28] The supreme court concluded that manufacturers or suppliers who merely designed and built component parts which were later incorporated into an improvement to real property by others were not protected by the Statute.[29]

The court reasoned that the Appellee would not be protected from liability for defects in the roof trusses if the manufacturer provided nothing more than a preconstructed product.[30] The court opined that the fabrication of roof trusses that were not manufactured for a particular construction project was an activity the legislature did not intend to protect under the Statute.[31]

Notwithstanding the above rationale, the supreme court did not explicitly exclude manufacturers and suppliers from coverage under the Statute.[32] Noting that the language of the Statute did not specifically protect manufacturers and suppliers, the court reasoned that manufacturers and suppliers could avail themselves of the protection of the Statute if the acts performed were associated with improving real property.[33] If a manufacturer or supplier of a product assisted in the design or incorporation of an improvement to real property, that manufacturer or supplier would be protected.[34] However, a manufacturer who did nothing more than supply a defective product which was incorporated by others into real property could not defend an

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27. *Id.* at 1334. The lower courts had focused attention on whether the specific product provided by a manufacturer or supplier was, itself, an improvement to real property. *Id.* at 1333. Specifically, the lower courts reasoned that the Appellee, as the manufacturer of the roof trusses, necessarily planned, designed and constructed an improvement to real property, and, therefore, qualified as a person protected by the Statute. *Id.*

28. *Id.* at 1334 n.2. The court opined that focusing on the product rather than the activity performed by the party moving for protection under the Statute resulted in an outcome that was not intended by the legislature. *Id.* at 1334.

29. *Id.* The supreme court held that the policy behind Pennsylvania's product liability laws would be undermined if product manufacturers were relieved of liability for defective products simply because their products somehow became part of an improvement to real property. *Id.* at 1334 n.4 (citing Webb v. Zern, 220 A.2d 835 (Pa. 1966)).

30. *McConnaughey*, 637 A.2d at 1334.

31. *Id.* Although not expressly overruling the superior court's decision in *Catanzaro*, the supreme court rejected the rationale used by the superior court in holding that a manufacturer of a defective skylight was protected by the statute. *Catanzaro*, 489 A.2d at 265.

32. *See McConnaughey*, 637 A.2d at 1334 n.3.

33. *Id.* at 1334.

34. *Id.*

action by claiming protection under the Statute.[35] In analyzing whether a particular manufacturer or supplier was included in the class of persons protected under the Statute, the court directed that the focus should be whether the person claiming the protection "furnished construction" or merely "furnished supplies" to be used in the improvement to the real property.[36] The supreme court, therefore, remanded the case to determine the Appellee's involvement in the construction of the barn.[37]

The present Statute of Repose applicable to construction projects is substantially similar to the Act of 1965, the original Statute of Repose.[38] The Act of 1965 was designed to limit the time during which an action could be brought against persons furnishing the design, planning, supervision, observation or construction of improvements to real property.[39] The Act of 1965 provided that, except in specified circumstances, all actions against such persons for deficiencies in their work had to be brought within twelve years after completion of the improvement.[40] Essentially, the Act of 1965 completely abolished any

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35. *Id.* at 1335.

36. *Id.* In reaching its decision, the supreme court emphasized that the distinction made between suppliers and manufacturers was based on differences in the conditions under which each had to perform their respective operations. *Id.* (citing *Freezer Storage*, 382 A.2d at 719). The court reasoned that manufacturers\suppliers could maintain high quality control and testing standards in a controlled work environment, whereas, builders had to perform their work under conditions which varied from site-to-site. *McConnaughey*, 637 A.2d at 1334. Further, each building was unique and more complex than any of its component parts. *Id.* Thus, the court concluded, actual use in the years following construction was the only real test that builders had for their products. *Id.*

37. *McConnaughey*, 637 A.2d at 1335.

38. *Mitchell*, 434 A.2d at 1247. The present Statute of Repose became effective in 1978 and is similar to the original enactment in substance. *See* Act of December 22, 1965, Pub. L. No. 1183, § 1 (1965) (codified as PA. STAT. ANN. tit. 12, § 65.1. (1971) (the "Act of 1965")).

39. *Leach*, 340 A.2d at 492. The legislative history indicates that the purpose of the Act of 1965 was to protect architects, engineers and contractors from accusations of professional failure long after an engagement was complete. PA. LEGIS. J. - HOUSE, 149th Gen. Assem., 1965 Sess., Vol. III, at 2243-44 (1965) (remarks by Rep. Mebus).

40. *See* Luzadder v. Despatch Oven Co., 834 F.2d 355, 357 (3d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988). The Act of 1965 provided:

> No action (including proceedings) whether in contract, in tort or otherwise, to recover damages:
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> (1) For any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property, (2) For injury to property, real or personal, arising out of any such deficiency, (3) for injury to the person or for wrongful death arising out of such deficiency, or (4) for contribution or indemnity for damages sustained on account of any injury mentioned in clauses (2) and (3) hereof shall be brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of such improvement more than twelve

cause of action against a class of persons who would normally be responsible for deficiencies in improvements to real property.[41]

In *Leach v. Philadelphia Savings Fund Society*,[42] the Act of 1965 was interpreted by the Superior Court of Pennsylvania to protect all persons involved in improvements to real property.[43] The plaintiff in *Leach* was employed as a construction craftsmen working to remodel the defendant's premises.[44] While the plaintiff was working on the premises, a plaster and wire ceiling fell on him causing serious injuries.[45] The superior court rejected the injured worker's argument that the Statute did not protect landowners.[46] Notwithstanding the fact that the Statute expressly excluded owners in possession of real estate, the superior court opined that a person was not necessarily unprotected merely because of their status or occupation in relation to the property or improvements.[47]

The court asserted that the class of protected persons was identified by the contribution or acts performed in improving the

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years after completion of such an improvement.

PA. STAT. ANN. tit. 12, § 65.1 (repealed 1978).

41. *See Freezer Storage*, 382 A.2d at 721. The Pennsylvania Statute of Repose applicable to construction projects differs from a statute of limitations in three significant respects. Claims covered by a statute of limitations accrue when a plaintiff either suffers or discovers the harm alleged, while the limitation period for a statute of repose runs from the completion of specific conduct by the defendant. *Id.* The Pennsylvania Statute begins to run at substantial completion which is the point at which the project or improvement can be used for its intended purposes. *Catanzaro*, 489 A.2d at 266 n.7. See note 9 for the text of 42 PA. CONS. STAT. § 5536. Second, under a statute of limitations, a plaintiff has a certain period of time, after the claim accrues, to institute an action before the claim is barred. *See Mitchell*, 434 A.2d at 1249. A statute of repose, on the other hand, completely abolishes and eliminates any cause of action that may have existed after the statutory time period has elapsed. *Id.* Thus, under Section 5536, a potential plaintiff must institute an action alleging a specific harm within 12 years after substantial completion of the project or have the right to seek relief completely extinguished, not merely barred. *Id.* at 1248. Finally, unlike statute of limitations, statutes of repose need not be specifically pleaded, but rather can be raised at any time as a defense. *Id.* at 1249.

The Act of 1965 defined the term "person" as an "individual, corporation, partnership, business trust, unincorporated organization, organization association, professional association or joint stock company." PA. STAT. ANN. tit. 12, § 65.5.

42. 340 A.2d 491 (Pa. Super. Ct. 1975).

43. *Leach*, 340 A.2d at 491.

44. *Id.*

45. *Id.* The ceiling was originally installed in the defendant's building in 1941. *Id.* at 492. The ceiling collapsed twenty-six years later on April 26, 1967. *Id.* The complaint alleged that the defendant failed to make reasonable inspections and necessary repairs to the ceiling. *Id.* at 494. The defendant landowner sought protection under the Act of 1965 because the accident occurred after the twelve-year statutory period. *Id.*

46. *Id.* at 493.

47. *Id.*

real property.[48] Interpreting the plain meaning of the Statute, the court reasoned that the Statute's protection was not limited to only architects, engineers and builders, but it applied to any person performing or furnishing any one of the enumerated activities.[49] Turning to the facts of the case, the superior court concluded that the record failed to establish any conduct or action by the defendant landowner that entitled him to protection under the Act of 1965.[50] Accordingly, the court excluded the defendant landowner from protection under the Act.[51]

The validity of the Act of 1965 was upheld against a constitutional attack in *Freezer Storage Inc. v. Armstrong Cork Co.*[52] In *Freezer Storage*, the owner of a warehouse brought a negligence action against a contractor who installed insulation material that caused the ceiling to collapse, damaging the warehouse and merchandise.[53] The contractor argued that the action was barred by the Act of 1965.[54] The warehouse owner contended that the Act was a special law and therefore was in violation of the Pennsylvania Constitution.[55]

The supreme court rejected the argument that the Act of 1965 was a "special law" that created arbitrary and irrational distinctions between architects, engineers and contractors and other persons who were involved in improving real property, such as

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48. *Leach*, 340 A.2d at 493.

49. *Id.* The Statute protects any person lawfully performing or furnishing the design, planning, supervision or observation of any improvement to real property. *See* 42 PA. CONS. STAT. § 5536 (1981). The superior court interpreted the word "any" to be comprehensive. *Leach*, 340 A.2d at 493.

50. *Leach*, 340 A.2d at 494. The defendant was not the record title holder to the building in 1941 when the ceiling was originally installed. *Id.* at 492. The court did not discuss the conduct or activity necessary to protect a subsequent purchaser of real property.

51. *Id.* at 490.

52. 382 A.2d 715 (Pa. 1978).

53. *Freezer Storage*, 382 A.2d at 717. Armstrong Cork installed the insulation material in the ceiling of Freezer Storage's warehouse in 1958. *Id.* The ceiling collapsed on April 18, 1973, causing $80,000 damage to the structure and the merchandise stored therein. *Id.* Freezer Storage brought an action against Armstrong Cork for negligently planning, designing and installing the insulation material. *Id.* The superior court affirmed the lower court's dismissal of the action because it was instituted more than twelve years after Armstrong had completed work on the ceiling. Freezer Storage, Inc. v. Armstrong Cork Co., 341 A.2d 184, 189 (Pa. Super. Ct. 1975), *aff'd*, 382 A.2d 715 (Pa. 1978).

54. *Freezer Storage*, 382 A.2d at 717.

55. *Id.* at 718. The Pennsylvania Constitution provides that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law . . . [r]egulating labor, trade, mining or manufacturing." PA. CONST. art. III, § 32.

landowners and suppliers.[56] The court opined that the legislature could consider the extent to which builders remained liable for their products in determining whether to limit the time period in which they were responsible for their products' deficiencies.[57] The court determined that the potential liability for builders was significantly greater than for owners and suppliers, and that the legislature could properly limit the builder's liabilities, without limiting the liabilities of owners or suppliers.[58] The court concluded that the Act of 1965 was constitutional because it was based on real and not arbitrary distinctions between the conditions under which builders, suppliers and landowners operated.[59]

The Act of 1965 was subsequently reenacted in 1978 as Section 5536.[60] The Statute was reenacted with no legislative debate.[61] Although the substance of the provisions remained the same, the legislature did modify the language of the Act of 1965 in enacting Section 5536.[62] The limiting language of the Act of 1965 stated "no action . . . shall be maintained more than twelve years after completion of such an improvement," whereas the language of Section 5536 provided that "a civil action . . . must be commenced within twelve years after completion of construction of such improvement."[63] Courts have interpreted both provisions similarly.[64]

The superior court expanded the breadth of the statute in *Mitchell v. United Elevator Co.*[65] to include manufacturers.[66]

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56. *Freezer Storage*, 382 A.2d at 718.

57. *Id.* The court looked to the differences in the class of potential plaintiffs, the legal theories under which liability could be established, and the respective abilities of builders, owners and suppliers to avoid liability. *Id.*

58. *Id.* at 719.

59. *Id.* The court accepted without holding that suppliers/manufacturers were not within the class contemplated by the Act. *Id.* In reaching the decision the court also held that the Pennsylvania Constitution did not prohibit the legislature from abolishing a cause of action without substituting some other means of redress. *Id.* at 720. Courts in other states have taken divergent approaches when faced with constitutional attacks on statutes of repose. *See* Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 656 (1985).

60. Act of April 28, 1978, Pub. L. No. 202, § 10 (1978) (codified as 42 PA. CONS. STAT. § 5536)). Section 5536 is similar to statutes enacted in the majority of states. *See Leach*, 340 A.2d at 491. *See also* Andrew Alpern, Note, *Statutes of Repose and the Construction Industry: A Proposal for New York*, 12 CARDOZO L. REV. 1975, 2014-24 (1991) (comparing statutes of repose).

61. *See Luzadder*, 834 F.2d at 357 n.4. *See also* Springman v. Wire Mach. Co., 666 F. Supp. 66, 68 (M.D. Pa. 1987).

62. *Luzadder*, 834 F.2d at 357.

63. *Id.*

64. *See Mitchell*, 434 A.2d at 1248.

65. 434 A.2d 1243 (Pa. Super. Ct. 1981).

In *Mitchell*, the plaintiff was seriously injured when he entered an elevator that had stopped ten to twelve inches below the level of the floor.[67] The plaintiff filed suit against the manufacturer of the elevator for injuries sustained in the fall.[68]

The court focused on whether the contribution made by the manufacturer constituted an improvement for purposes of the Statute.[69] The court rejected the argument that construction of the elevator was analogous to supplying a ready-made product that was merely incorporated into an improvement of real property.[70] In the alternative, the court viewed the installation of a complex elevator system as an improvement to real property.[71] Thus, the court concluded that the manufacturer was within the class of persons whose acts contributed to an improvement to real property, and therefore, qualified for protection from liability under the Statute.[72]

The scope of protection afforded to manufacturers was subsequently expanded in *Catanzaro v. Wasco Products*.[73] In *Catanzaro*, the plaintiff brought a personal injury action against a manufacturer alleging defective design and improper construction of a skylight installed in the roof of his employer's building.[74] The court considered whether a manufacturer who sup-

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66. *Mitchell*, 434 A.2d at 1249.

67. *Id.* at 1244. The plaintiff was an elderly man with failing eyesight who fell while attempting to enter an elevator in the apartment building where he resided. *Id.* The accident occurred on June 20, 1974. *Id.* At the time of the accident, the plaintiff was unaware that the elevator cab had stopped 10-12 inches below the floor from which he stepped. *Id.* The plaintiff fell and severely fractured his hip. *Id.* He subsequently underwent hip replacement surgery. *Id.*

68. *Id.* at 1245. Westinghouse Electric Corporation manufactured and installed the elevator at the time the apartment building was under construction in 1950. *Id.* at 1248. The plaintiff's injury occurred in 1974 and his suit was filed in 1975. *Id.* Westinghouse argued that the Statute abolished the plaintiff's cause of action because the suit was not brought within twelve years after completion of the project. *Id.*

69. *Id.* at 1249-50.

70. *Id.* at 1249.

71. *Mitchell*, 434 A.2d at 1249. The court distinguished the elevator from prefabricated component parts based upon the complexity of the components, motors, cable, wiring and machinery required for its installation. *Id.* The court opined that although the basic design of the elevator system may have been identical to those installed by the manufacturer in other buildings, this fact alone did not render the elevator a lesser improvement to real property. *Id.*

72. *Id.* The court distinguished this case from *Leach* based on the facts underlying each case. *Id. Mitchell* addressed the issue of whether manufacturers were protected by the Statute. *Id.* The question presented in *Leach* was whether landowners were protected under the Statute. *See Leach*, 340 A.2d at 493.

73. 489 A.2d 262 (Pa. Super. Ct. 1985).

74. *Catanzaro*, 489 A.2d at 264. The plaintiff was injured on June 30, 1980, when he fell through an acrylic skylight located on the roof of a school building. *Id.* The skylight was installed in 1961 during construction of the building. *Id.* at 266.

plied a defective skylight was within the protected class under the Statute.[75] The court focused on whether the product supplied by the manufacturer constituted an improvement to real property.[76] The court determined that the skylight was a fixture and that fixtures were improvements to real property.[77] Because the manufacturer planned, designed and built the skylight, the court concluded that the manufacturer constructed an improvement to real property.[78] As a result, the court decided that the manufacturer was afforded protection by the Statute.[79]

The court in *Catanzaro* rejected a restrictive reading of the Statute which would require manufacturers to customize their product to the improvement or assist in its installation.[80] The *Catanzaro* opinion expanded the class of persons protected by the Statute to include manufacturers who planned, designed or fabricated building components found to be real property improvements, regardless of their actual involvement in the improvement process.[81]

McCormick v. Columbus Conveyer Company[82] presented the supreme court with the opportunity to define the scope of Section 5536 as well as decide whether manufacturers were protected by the Statute.[83] In *McCormick*, an injured employee brought a product liability action against the manufacturer of a belt conveyor installed as part of a coal delivery system.[84] The

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The twelve year statutory period started to run in 1961 and expired in 1973. *Id.* Because the personal injury action was filed in July of 1981, the defendant argued that the plaintiff's claim was barred by the statute. *Id.*

75. *Id.* at 265.

76. *Id.* at 264.

77. *Id.* at 265. The superior court recognized that fixtures have traditionally been regarded as improvements to real property by Pennsylvania courts. *Id.* The superior court defined a fixture as "an article of personal property which, by reason of physical annexation to a building, becomes part of the real estate." *Id.* at 265 n.4. The court compared the skylight to a window because each product was designed to be incorporated into a building as a finished product. *Id.* at 265. *See also* Schmoyer v. Mexico Forge Inc., 621 A.2d. 692 (Pa. Super. Ct. 1993) (holding that the manufacturer of playground equipment permanently attached to realty was protected by the Statute, notwithstanding the fact that the manufacturer did not assist in its installation). *Contra* Beaver v. Danski Industri Syndicat A/S, 838 F. Supp. 206, 211 (E.D. Pa. 1993) (noting that federal district courts have excluded manufacturers from protection under the Statute).

78. *Catanzaro*, 489 A.2d at 265. The court considered immaterial the fact that the manufacturer did not assist in the planning or installation of the skylight. *Id.*

79. *Id.* at 266.

80. *Id.* at 265-66.

81. *Id.* at 265. In doing so, the court expanded its earlier decision in *Mitchell*, where it held that the Statute was applicable to manufacturers who assisted in the installation of real property improvements. *Id.* at 266.

82. 564 A.2d 907 (Pa. 1989).

83. *McCormick*, 564 A.2d at 909-11.

84. *Id.* at 908. The coal delivery system was installed in 1948 during the con-

court addressed the question of whether manufacturers who supplied equipment for others to install into realty were protected under the Statute.[85]

The supreme court rejected a narrow interpretation of the Statute that would limit the protected class to persons acting in the capacity of an architect, engineer or contractor.[86] The court found that the conveyor manufacturer did more than supply a standard piece of equipment that was indistinguishable from other mass-produced equipment.[87] The court determined that the defendant engineered and fabricated the belt conveyor using specifications uniquely suited to the site.[88] The court concluded that because the manufacturer designed an improvement to the real property, it was entitled to appropriate protection under the Statute.[89]

While continuing to place emphasis on the issue of whether a moving party furnished an improvement to real property, the superior court limited the protected class of persons covered by the Statute in *Ferricks v. Ryan Homes, Inc.*[90] In *Ferricks*, the plaintiffs sought to recover for personal injuries and property damage that allegedly resulted from exposure to formaldehyde vapors emanating from plywood that was used in the construction of their home.[91] The question presented to the court was whether plywood constituted a fixture because it could not be removed without material injury to the realty.[92] The superior court rejected this proposition and reasoned that a multi-purpose building material such as plywood, which was used as a component in the creation of a finished product, did not fall within the definition of an improvement to real property.[93] The

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struction of a powerhouse that provided heat and hot water to the Bucknell University campus. *Id.* at 909. The plaintiff received severe injuries leaving him partially disabled as a result of a 1982 work-related accident in which his right arm was crushed by the belt conveyor. *Id.* at 908. The manufacturer asserted that the twelve year Statute of Repose barred the plaintiff's action. *Id.*

85. *Id.* at 909. The plaintiff argued that the defendant manufacturer simply manufactured the belt conveyor and supplied the equipment to a general contractor to install, and therefore the Statute should not bar an action against the company. *Id.*

86. *Id.* at 910.

87. *Id.*

88. *McCormick*, 564 A.2d at 910.

89. *Id.* at 910-11. The Supreme Court of Pennsylvania declined to address the issue of whether a manufacturer who merely supplied a preconstructed component part that was incorporated into real estate by others as an improvement was protected under the Statute. *Id.* at 911.

90. 578 A.2d 441 (Pa. Super. Ct. 1990).

91. *Ferricks*, 578 A.2d at 442.

92. *Id.* at 443.

93. *Id.* The superior court held that the plywood manufacturers were merely

superior court concluded that only a finished product, with a singular purpose within a structure, constituted a fixture.[94]

After the *McConnaughey* decision, the supreme court clarified the scope of persons protected by the Statute in *Noll v. Harrisburg Area YMCA*.[95] *Noll* presented the question of whether a swimming pool equipment manufacturer who supplied preconstructed starting blocks could plead the Statute of Repose as a defense to a product liability action.[96] Consistent with *McConnaughey*, the court focused on the activity performed by the manufacturer in relation to the improvement process.[97] The court found that the manufacturer provided individual expertise when the manufacturer evaluated the unique dimensions of the pool and determined that its product was appropriate.[98] The court concluded that the manufacturer's conduct was, therefore, similar to that performed by builders who designed a project.[99]

Although the manufacturer did nothing more than examine the specifications of the pool in making its determination and subsequently provided a standard stocked item, the court concluded that this was sufficient to bring the manufacturer within the protected class.[100] The supreme court, therefore, held that the diving block manufacturer was within the class of persons protected by the Statute when it evaluated whether its products were appropriate for an improvement to real property.[101]

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furnishing a material to be used in the construction of the actual improvement. *Id.* at 444. The plywood was not considered a fixture because it was simply a component part of the improvement. *Id.*

94. *Id.* See note 75 and accompanying text for a discussion of the superior court's definition of fixtures.

95. 643 A.2d 81 (Pa. 1994).

96. *Noll*, 643 A.2d at 84. The diving blocks were purchased in July of 1972. *Id.* at 85. The court assumed that the blocks were installed after they were purchased because the record was unclear on when the blocks were anchored to the pool. *Id.* The seventeen year-old plaintiff was rendered a quadriplegic on May 17, 1987, as a result of diving into a swimming pool from the starting blocks. *Id.* at 83. The plaintiff brought suit against the pool equipment companies, the starting block manufacturer and the pool owner for injuries resulting from the diving accident on September 8, 1988. *Id.*

97. *Id.* at 86.

98. *Id.* Prior to shipping the diving blocks, the appellee examined the dimensions of the pool to determine which diving blocks were appropriate. *Id.*

99. *Id.* The court pointed out that the decision did not mean that every manufacturer who shipped goods per the specifications or drawings would be protected by the Statute. *Id.* at 86 n.5. Rather, the facts had to support a finding that the manufacturer/supplier provided some measure of expertise in the design or construction of an improvement along with its product. *Id.*

100. *Id.* at 86.

101. *Noll*, 643 A.2d at 87. Although the court found that the appellee was within the protected class, the court held that the starting blocks were not improvements to realty within the meaning of Section 5536. *Id.* at 88-89. In so holding, the

Pennsylvania courts have consistently interpreted the Pennsylvania Statute of Repose to require that a moving party demonstrate that three conditions exist in order to receive protection under the Statute.[102] The moving party must first establish that the product supplied was an improvement to real property.[103] Next, the moving party must establish that more than twelve years has elapsed between the completion of the improvement and the injury claimed.[104] Finally, the moving party must demonstrate that the activity in question was within the appropriate classification protected by the Statute.[105]

Much of the litigation concerning the applicability of Section 5536 focused on the class of persons protected and the activities that constituted "furnishing the design, planning, supervision, or observation of construction, or construction of any improvement to real property."[106] Specifically, the cases questioned whether manufacturers and suppliers of building products and other real property improvements were within the purview of the Statute.[107] Prior to *McConnaughey*, the Supreme Court of Pennsylvania had provided little guidance for the interpretation of Section 5536.[108] As a result, the intermediate state appellate courts and federal district courts sitting in diversity jurisdiction diverged on the scope of the Statute's coverage and the class of protected persons.[109]

The Pennsylvania trial and intermediate appellate courts consistently focused on whether the contribution made by a defendant manufacturer constituted an improvement to real property.[110] Upon a determination that the contribution or

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court established the standard that Pennsylvania courts should use to determine whether an item of personalty becomes a "fixture" or whether it remained personal property for purposes of the Statute of Repose. *Id.* at 87. The court considered three factors to be important to the determination: "(1) the relative permanence of attachment to the realty; (2) the extent to which the chattel is necessary or essential to the use of the realty; and (3) the intention of the parties to make a permanent addition to the realty." *Id.*

102. *See McCormick*, 564 A.2d at 907.

103. *Id.* at 909.

104. *Id.*

105. *Id.* at 910.

106. 42 PA. CONS. STAT. § 5536(a) (1981). *See Schmoyer*, 621 A.2d at 694; *see also Beaver*, 838 F. Supp. at 211-14 (discussing the divergent views of the state appellate and federal district courts concerning the persons protected by the Pennsylvania Repose Statute).

107. *See, e.g., Beaver*, 838 F. Supp. at 211.

108. *See, e.g., McCormick*, 564 A.2d at 911.

109. *Schmoyer*, 621 A.2d at 695 n.2. The courts had little guidance from the limited amount of legislative debate involved in enacting section 5536 or its predecessor. *See* Vasquez v. Whiting Corp., 660 F. Supp. 685, 688 (E.D. Pa. 1987).

110. *See, e.g., Catanzaro*, 489 A.2d at 265; *see also Schmoyer*, 621 A.2d at 695.

product was an improvement, the courts concluded that the manufacturer planned, designed and built the improvement.[111] As a result, the manufacturer was found to be a person "furnishing . . . construction of [an] improvement to real property," and thus was within the purview of the Statute of Repose.[112] The lower state courts failed to thoroughly consider whether the manufacturer participated in the planning, design or construction of the improvements to the realty.[113] In the alternative the Statute was broadly interpreted to include any party associated with the improvements.[114] Thus, under the superior court's analysis, manufacturers were protected by Section 5536 provided that the product supplied was considered a real property improvement.[115]

The federal court's interpretation of the statute limited the protected class.[116] Interpreting the language of Section 5536 narrowly, the federal district courts concluded that manufacturers, as a class, were excluded from protection under the Statute.[117] The federal courts held that manufacturers, by exclusion, were not covered under the plain meaning of the Statute.[118] The courts reasoned that the omission of the word manufacturers indicated the Pennsylvania General Assembly's intention not to protect manufacturers.[119] Moreover, the federal courts held that the policy underlying Pennsylvania product liability laws would be undermined if manufacturers were permitted to escape liability merely because their products became improvements to realty.[120]

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111. *See, e.g.*, *Catanzaro*, 489 A.2d at 266.

112. *Id.* at 265. See note 9 and accompanying text for the text of the Statute.

113. *See McConnaughey*, 637 A.2d at 1334 n.3.

114. *See Catanzaro*, 489 A.2d at 265. See note 77 and accompanying text for the superior court's interpretation of the Statute.

115. *McConnaughey*, 637 A.2d at 1334 n.2 (citing *Catanzaro*, 489 A.2d at 266).

116. *See, e.g.*, *Beaver*, 838 F. Supp. at 211.

117. *See Beaver*, 838 F. Supp. at 212; *see also Luzadder*, 834 F.2d at 358-59; *Springman*, 666 F. Supp. at 69; *Vasquez*, 660 F. Supp. at 688; *but see* Facenda v. Applied Powers, Inc., No. 87-0980, 1987 WL 14151 (E.D. Pa. July 17, 1987); Gnall v. Illinois Water Treatment Co., 640 F. Supp. 815 (M.D. Pa. 1986).

118. *See Beaver*, 838 F. Supp. at 212; *but see* Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992) (holding that pool manufacturers who contracted with an installer were protected by the Statute); Homrigasen v. Westinghouse Elec. Corp., 832 F. Supp. 903 (E.D. Pa. 1993) (holding that an escalator manufacturer who installed an escalator was protected by the Statute).

119. *See, e.g.*, *Beaver*, 838 F. Supp. at 212.

120. *Id.* The district court specifically referred to section 402A of the Restatement (Second) of Torts. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)). Section 402A of the Restatement (Second) of Torts was adopted as the law of Pennsylvania in 1966. *See* Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966). The court held that the policy underlying Section 402A would be undermined if manufacturers and

The decision of the Supreme Court of Pennsylvania in *McConnaughey* correctly defined the scope of protection provided by the Pennsylvania Statute of Repose.[121] The decision limited the protected class to persons who actively participate in the planning, design, construction or observation of construction projects or incorporation of other improvements to real property.[122] The court focused on the activity performed by the manufacturer or supplier in reference to the improvement.[123] Judicial inquiry should not focus on whether a party claiming protection under the Statute furnished an improvement to real property. Rather the proper inquiry should be whether the party claiming protection performed acts involving the design, planning, supervision or construction of the improvement to the realty. It is the significance of the activity performed by the moving party that should be the determining factor in deciding whether the party should be within the class of persons effectively protected under the Statute.

Once the requisite activity has been established, attention should then turn to whether the undertaking involved improving real property. Focusing judicial inquiry on whether the product supplied was itself an improvement has led to inconsistent results.

Although the *McConnaughey* decision held that the Statute was generally inapplicable to manufacturers and suppliers, persons within those categories would be afforded protection when their involvement amounted to more than supplying a defective product.[124] The requisite involvement was clarified in *Noll* where the supreme court held that manufacturers functioned as builders when they used their individual expertise to determine whether a specific product was suited to the unique dimensions of an improvement.[125] Thus, when a manufacturer considers the dimensions of an improvement and determines that its prod-

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suppliers could escape liability merely because their defective products became part of an improvement to real property. *Beaver*, 838 F. Supp. at 212 (citing *Vasquez*, 660 F. Supp. at 689).

121. *See McConnaughey*, 637 A.2d at 1334.

122. *Id.*

123. *Id.* at 1334 n.3.

124. *Id.* at 1335. In reference to manufacturers and suppliers, the supreme court held that "the operative question before us is whether [the party moving for protection under the statute] 'furnished construction' or merely 'furnished supplies' to be used in construction." *Id.*

The supreme court, without expressly stating, appeared to be addressing the interpretations of Section 5536 made by the federal district courts. *See, e.g.*, *Beaver*, 838 F. Supp. at 211.

125. *Noll*, 643 A.2d at 86.

uct is appropriate, the manufacturer is involved in the design of the improvement to real property.[126] Accordingly, a manufacturer or supplier who assists in the design of an improvement to property or in some way customizes its product to the realty will be protected from liability twelve years after completion of the project.

Similar to the statutes enacted in other states, the Pennsylvania Statute of Repose was intended to protect the actors rather than the products involved in improving real property. The fact-finder must consider whether the activity alleged to have caused the harm was the kind of activity the Pennsylvania legislature intended to protect by the Statute.[127] Focusing on whether parties have supplied an improvement without inquiry into their involvement in the actual improvements to real property frustrates the intent behind the Statute. The Statute was intended to limit the contractor's long-term liability exposure for defects in building projects.[128] Without a limit on potential liability, architects, engineers and contractors could remain responsible for defects for extended periods under circumstances where they have no control over the property or the number of persons exposed to a condition.

If the Pennsylvania General Assembly intended a general repose statute for manufacturers and suppliers, then the legislature would have explicitly provided for it in Section 5536, or, in the alternative, the legislature would have enacted more comprehensive legislation.[129]

The Statute should not apply to manufacturers and suppliers who merely supply defective products. Their abilities to test and control the quality of their products in a controlled environment distinguishes them from contractors. Contractors must deal with the unique characteristics of each project that many times are not known at the beginning of the project. Judgment calls and on-the-spot decisions are frequently required to address unanticipated conditions. Drawings and specifications for the project are changed many times in the course of the project. Additionally, architects, designers and contractors must work with other contractors, suppliers, and materialmen in order to complete the projects. Changes in the land, weather, work force, labor climate

126. *Id.*

127. *See McConnaughey*, 637 A.2d at 1334. The Pennsylvania trial and intermediate appellate courts focused little attention on legislative intent due to the limited amount of legislative history available. *See Vasquez*, 660 F. Supp. at 688.

128. See note 39 and accompanying text.

129. *See Vasquez*, 660 F. Supp. at 689 n.5.

and materials complicate this process. The supreme court's decision in *McConnaughey* correctly limits the Statute's protection to those persons who must operate within an industry characterized by change.

Some might contend that manufacturers of building products and builders are similarly situated in their abilities to defend an action after the passage of time. Further, the availability of persons potentially involved in litigation and the location of pertinent information obviously becomes more difficult to locate over time. A blanket extension of the Statute of Repose to manufacturers would unduly undermine the protection afforded victims of defective products by the Pennsylvania product liability laws. Such a change in Pennsylvania should come from the legislature.

Paul R. Naim